

STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION

In the Matter of:)
Application for Certification of the)
Telsa Power Project)
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Docket No. 01-AFC-21

**Staff Response to December
16, 2003 Committee Order**

December 31, 2003

Staff Response to December 16, 2003 Committee Order

Staff's Proposed Conditions of Certification on Air Quality

Staff has recommended several changes to its originally proposed conditions of certification for the area of Air Quality. These changes are the result of either requests from the applicant made during the hearings on the record, or discussions with the parties at the request of the Committee.¹ Staff has attached to this document, per the Committee's request, the current staff recommendations for Conditions of Certification to the Air Quality section. Please see attached document. In addition Staff has also docketed a complete set of the current staff recommendations for the Tesla Power Plant (TPP) Conditions of Certification in all subject areas.

**RELEVANCE OF ISSUES ASSOCIATED WITH THE BUENA VISTA SHREW TO
BIOLOGICAL RESOURCES AND WATER RESOURCES**

Background

On December 16, 2003, the Committee directed staff to provide its position on the relevance of testimony concerning the Buena Vista Lake shrew (shrew) to the Tesla Power Plant (TPP) proceedings. The shrew is an endangered species protected under the federal Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) (ESA) that has very small and isolated populations that are vulnerable to extinction. The Committee order acknowledges existence of a substantial amount of testimony related to impacts

¹ All Changes to Air Quality conditions have been previously docketed or presented at hearings. Neither the attached document, nor the docketed set of Conditions of Certification contain any new conditions or changes for consideration by Committee.

to the shrew. This testimony was provided by staff in the Final Staff Assessment (FSA), the United States Fish and Wildlife Service (USFWS or Service) on September 18, 2003, and in letters from USFWS dated August 25 and September 25, 2003 (See RT 9/18/03 pp. 72-103; Exhibit 63, and proposed Exhibit 164). The need for clarification is related to the letter dated September 25, 2003 (Proposed Exhibit 164).

Response

The letter submitted by the USFWS on September 25, 2003 (Proposed Exhibit 164) reinforced the testimony given by Susan Jones on behalf of the USFWS on September 18, 2003. (RT 9/18/03 pp. 72-103) This testimony highlighted the USFWS concerns with the timing of the USFWS Biological Opinion (Biological Opinion) if the applicant continued to pursue the Kern County water source. The USFWS stated during evidentiary hearing that there would be a delay of several months in the release of the Biological Opinion, and that it could not testify at this time that the Kern County water source was in compliance with the ESA, but any water source utilized by the TPP would need to be in compliance with the ESA. (RT 9/18/03 pp. 72-103, Exhibit 63). Staff finds the September 25, 2003 letter (proposed Exhibit 164) consistent with the testimony provided on September 18, 2003, and believes the issues associated with the shrew are still relevant to the TPP proceedings and consistent with the evidence in the record.

Regardless of the water supply used by the project, the TPP will need to demonstrate compliance with the federal ESA as stated in the September 25, 2003 letter from the USFWS. The level of impact that may occur as a result of the use of freshwater from Kern County would need to be determined as significant scientific uncertainty exists about the size, health, composition, and viability of the remaining shrew populations in that area of Kern County. Susan Jones, USFSW, testified to this during evidentiary hearings on September 18, 2003. (RT 9/18/03 pp. 72-103) The letter submitted on September 25, 2003 reiterates these key points of the testimony, and is consistent with the testimony, not contradictory as applicant argues in its reply brief dated December 1, 2003.

If reclaimed water is required for the proposed project, the potential long-term biological impacts associated with obtaining the water from Kern County would no longer be a concern and issuance of the Biological Opinion would be forthcoming, consistent with the anticipated time frames in which the Committee would be presenting a proposed decision to the full Commission. Susan Jones, USFWS, testified that if the applicant were to use reclaimed water from the City of Tracy the Biological Opinion could be prepared in a matter of weeks, as the service has all information needed to make the necessary findings for the project. If the applicant pursues the Kern County water source, the Service does not have an estimated time frame for completion of the Biological Opinion. (RT. 9/18/03 pp. 72-103) USFWS will need to determine whether the water source complies with the ESA. In order to make this finding USFWS will need to assess the potential for impacts to the shrew, which will significantly delay issuance of the biological opinion. (RT. 9/18/03 pp. 72-103; Exhibit 63, and Proposed Exhibit 164).

Staff's position has not changed. The TPP will need to comply with the USFWS Section 7 requirements to address potential impacts to federally listed species per the Biological Opinion for the TPP project (per Condition of Certification **BIO-9**). The letter from USFWS that applicant cites reiterates the testimony provided on September 18, 2003 by Susan Jones. It states:

The applicant proposes to purchase flood water from the Kern River in Kern County from the Buena Vista/Rosedale –Rio Bravo Water Banking and Recovery Program. The U.S. Fish and Wildlife Service (Service) has determined that use of the Kern River water is not a part of the Tesla Power Plant project because the water withdrawal is likely to occur whether the Tesla Power Plant Project is built or not. **At the hearing the Service stated that this determination had recently been made. The Service also stated that the Tesla Power Project Biological Opinion, to be issued by the Service, will include a requirement that any water source used by the project will have to have demonstrated compliance with the Act.** (emphasis added)

(Proposed Exhibit 164) The September 25, 2003 letter states that the Kern River Water is not a part of the TPP. This statement was also made during evidentiary hearings. Both this statement and the letter were to inform the parties and Committee that the Service did not intend to reexamine the Kern River Water project as the water will be withdrawn irregardless of the TPP, and a certified environmental impact report was adopted by Kern County last year. This fact, however, does not negate the Services intent to ensure that the water source used by the TPP is in compliance with the ESA, and therefore assess any potential impacts the Kern water source may have on the shrew. This was stated directly during evidentiary hearings, and reiterated in the September 25, 2003 letter. (RT 9/18/03 pp. 72-103; proposed Exhibit 164) Staff therefore continues to believe the testimony presented on September 18, 2003 by the USFWS related to the shrew is relevant to the TPP proceedings, and must be considered in this proceeding. This is particularly critical as the Commission has not received a Biological Opinion, and will likely not receive an opinion for several months if the applicant continues to pursue the Kern County water source. There is also no evidence in the record from USFWS that the proposed Kern County water supply, which the applicant is proposing to use as the project's cooling water source, will be in compliance with the ESA. Staff therefore, would ask the Committee to fully consider the evidence set forth in the record, including the testimony presented by USFWS on September 18, 2003.

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CONCLUSION

Staff requests that the Committee adopt the attached recommended Conditions of Certification for the TPP. Staff additionally requests that the Committee fully consider the testimony presented by the USFWS on September 18, 2003 concerning the shrew. Staff believes the testimony is relevant as there is no Biological Opinion before the Commission, and the letter reinforces the testimony provided by Susan Jones during the evidentiary hearings.

Dated: December 31, 2003

Respectfully submitted,

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